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an option to purchase if she "at any time should desire to sell said property." As indicated above, this is equivalent to a promise not to sell without offering to Carrano; which was to secure him the benefit of any change in Mrs. Saraceno's circumstances or mind. To say that she can terminate this duty merely by electing to do so, robs the contract, for which he gave consideration, of all value to him, and is an unsound construction of the parties' expression of intention. Indeed the very case the parties envisaged was before the court: one removes clouds on title that he may sell—to someone else.

The real problem of construction is to determine how long the duty was to last. Was it to bind the land in perpetuity, or only for a reasonable time in view of the situation of the parties at the time the agreement was made? Or—which is but a special form of the "reasonable time"—during Mrs. Saraceno's life? It is believed that the reasonable time construction might most fairly be adopted, and that the court's decision may be sustained on the ground that it had elapsed. But so far as the opinion involves a holding that the agreement reserved to Mrs. Saraceno a "right" to elect not to sell, it is believed to be unsound. The parties said nothing of a power in her to set the whole transaction at nought by electing *not* to sell. To read such a power into the contract decreases almost into nothingness the business value of the negative covenant included in such contracts.

RECOGNITION OF "MASSACHUSETTS RIGHTS" BY NEW YORK COURTS

The recent case of *Loucks v. Standard Oil Co. of New York* (1918, N. Y.) 120 N. E. 198 is noteworthy as marking a departure by the New York Court of Appeals not so much from its past decisions upon the problem involved as from the doctrines of the Conflict of Laws upon which those decisions were based.[1] A resident of New York had been wrongfully killed in Massachusetts by the act of a servant of the defendant, the latter being also a resident of New York.[2] Under the Massachusetts statute, conceded by all parties to be applicable to the case if the suit were brought in that jurisdiction, an action accrued in favor of the estate of the deceased for the benefit of his widow and children. This statute fixed the damages at not less than $500 nor more than $10,000, to be assessed not according to the loss suffered by the beneficiaries but "with a reference to the degree of culpability" of the defendant or his servant. The Court of Appeals

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[1] *Wooden v. Western N. Y. & P. R. R. Co.* (1891) 126 N. Y. 10, 26 N. E. 1050, apparently is in effect overruled.

[2] The defendant was a New York corporation. As is well known, it is common to regard such a "legal person" as a resident of the state in which it is incorporated. Of course this is pure fiction, based upon the fiction of corporate personality.

held that the plaintiff, the administrator, could recover in New York in accordance with the terms laid down in the Massachusetts statute, even though these differ from the corresponding New York statute. So far as the authorities go upon the precise question involved they are, as is well known, in conflict, although the more modern cases tend to adopt the view which prevailed in the case before us.[3] In stating the problem before the court Mr. Justice Cardozo said: "The question is whether a right of action under that [the Massachusetts] statute may be enforced in our courts. 'The courts of no country execute the penal laws of another.' *The Antelope* (1825) 10 Wheat. 66, 123." He then decided that the statute, while "penal" so far as the amount of damages was concerned, was intended essentially to redress a private wrong, and so not within the rule quoted. He also held that no public policy of New York forbade the "enforcement" of a "foreign right" of this character.

The decision in the case commends itself as a sound result. Indeed, it is not too much to hope that it is only another step toward a "uniform interstate enforcement of vested rights."[4] As to the reasoning of the court, so far as it involves a discussion of the fundamental theories of the Conflict of Laws one cannot be quite so sure. Indeed, when one reads the cases and the text-writers upon this branch of Anglo-American law he discovers little but chaos, both as to concrete decisions and as to the reasons therefor. Even a superficial study will, it is believed, reveal the difficulty, *viz.*, that there is no consensus of opinion as to the fundamental concepts involved; that the underlying logical and legal bases of the doctrines are in dispute. Some see in the Conflict of Laws a body of real international law; others regard it as a body of law dealing with the "recognition and enforcement of foreign created rights," perhaps on the basis of "comity" or because the foreign rights are "vested"—but space fails in which even to enumerate all the various opinions as to fundamental theory. Small wonder that there is a confusion of tongues and a conflict of decision.

Much of the difficulty seems to be due to false notions as to the "territoriality" of law, notions which the present opinion seems at many points to adopt.[5] In the classic treatise of Story the doctrine is thus stated: "No state or nation can by its laws directly affect or bind property out of its own territory, or bind persons not resident

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[3] The leading cases are cited in the opinion in the case under discussion. Citation is therefore omitted here.

[4] *Cf.* Beach, "Uniform Interstate Enforcement of Vested Rights" (1918) 27 YALE LAW JOURNAL, 656.

[5] Thus the learned judge says on page 201 of the opinion: "A foreign statute is not law in this state, but it gives rise to *an obligation* which, if transitory, 'follows the person and *may be enforced wherever the person may be found.*'" (The italics are those of the present writer.)

therein, whether they are natural born subjects or others."[6] To what extent is such a statement true? What meaning can it have? Aside from some existing system of positive law—constitutional, statutory, or judge-made—it seems clear that there is no inherent reason why the law of any sovereign nation—England, for example—may not, if the sovereign English Parliament or the appropriate English court so decrees, attach any legal consequences whatever to any state of facts whatever, including acts done in other countries, even by persons not citizens or residents of England. This simply amounts to saying that as a sovereign nation England may determine what legal consequences shall in England, by English courts, be held to attach to a given state of facts, if in any way the English court is presented with a case involving them.[7] Suppose, for example, that an English statute should provide that any person whatsoever who, under the circumstances described in the statute, injured any other person anywhere in the world, should be deemed guilty of a tort and that if he ever came into England or owned any property there he should be subject to suit and damages assessed in a prescribed manner: surely the English courts would be bound to apply the statute to all cases coming within its scope.[8] Clearly, also, they could not enforce the statute against persons committing the acts in question outside the jurisdiction so long as these persons both remained outside and had no property within the jurisdiction. To describe this situation in appropriate legal terminology must we not say that such a statute would *as a matter of substantive law* create primary rights in every person in the world to have all other persons refrain from the described conduct, and that when anyone was guilty of those acts anywhere a secondary English right to damages would arise? This right could not, of course, be enforced so long as the tortfeasor both remained outside of England and had no property there; but this is equally true where the tort is committed in England and the tortfeasor before action is brought, or even after it has been brought, leaves that jurisdiction and has no property within the same. That the law of England does not in fact attempt to go so far as in the case just put does not, then, show

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[6] *Conflict of Laws* (8th ed.) sec. 20. The present writer doubts whether Story meant all that later writers have attributed to him.

[7] Of course some other sovereign nation may object, on the ground that "international law" is being violated, or on any other grounds it chooses to assert. The United States, for example, did this successfully in the *Cutting Case,* in which Mexico claimed the right to punish an American citizen for acts done in the United States. 2 Moore, *Int. Law Dig.* 228. It can hardly be asserted, however, the Mexican law was not law in Mexico, *i. e.,* binding on the Mexican courts. If from the present war there emerges a real League of Nations with power to enforce its decrees, a different legal situation may result.

[8] It is not contended that a system of law which did this would be a convenient system, but merely that it is not a logically impossible one, as seems to be assumed by so many writers and judges.

any inherent lack of power on the part of the English legislature or courts, but merely that they have refrained from establishing such a system for other reasons.[9]

It frequently happens that all the operative facts[10] of a given case do not take place in one jurisdiction. The principal case is an excellent example. From the point of view of a Massachusetts court the chief facts were as follows: the defendant, a resident of New York, had employed a servant (whether the making of the contract of employment, *i. e.*, all the acts of the defendant in hiring the servant, took place in New York or Massachusetts or somewhere else does not appear); the servant, acting within the scope of his employment, did certain acts negligently in Massachusetts; as a consequence a person was injured there; that person died in Massachusetts; he left surviving a widow and children, all residents of New York. To these facts all conceded that the Massachusetts statute applied. Be it noted that if the agreement of employment was made in New York, the acts of the defendant were all done in New York. Nevertheless, we find it conceded that Massachusetts law both confers upon residents of New York (the administrators, the widow, and the children of the deceased) a right to damages and also imposes upon a resident of New York a correlative duty to pay those damages, in spite of the fact that not one of the parties has ever done anything in Massachusetts or, so far as appears, has ever been within the borders of that state.[11] From the point of view of a New York court we must add as a part of the operative facts the existence of the Massachusetts statute and the resulting "Massachusetts rights," which include (1) the primary right that the acts in question shall not be done and (2) the remedial right to damages which arises when the acts have been committed. The problem for the New York court, it is submitted, therefore is, not whether the Massachusetts statute or "Massachusetts right" shall be enforced in New York, but simply, what legal consequences according to New York law attach to all of these facts?[12] Does New York law attach the same legal consequences to these facts that are attached by the New York statute to similar facts, all of which take place in New York? Conceivably it may; but also conceivably it may regard the existence of the Massachusetts law and the resulting rights in Massachusetts courts—regarding them as facts—as reasons for attach-

[9] Lack of space forbids even an enumeration of these reasons. One doubtless was the very notion of the territorial limitation of law, the erroneous character of which it is sought here to demonstrate.

[10] The term "operative facts" seems a happy one to describe the totality of facts to which the law attaches certain legal consequences.

[11] Doubtless the fiction of the "identity" of the servant with the master has served to conceal the truth of the situation. When that is discarded one sees at once that the "territorial" theory that the law of a country cannot impose substantive legal duties on persons outside the jurisdiction would prevent the Massachusetts statute from imposing duties upon the defendant in the principal case.

ing legal consequences identical in scope with those attached by the Massachusetts law to the facts which for that jurisdiction constitute the operative facts.

If the foregoing be the correct analysis of the situation, it is clear that the New York court is not enforcing the Massachusetts right of action, but a New York right of action given by New York law but identical in scope with the Massachusetts right. One or two analogies may perhaps serve to bring out the point of view here suggested. It is common to speak of "enforcing" foreign judgments. This clearly is a loose and technically erroneous way of putting the matter. What we ought to say is, that the common law of England and of each of the American states attaches to foreign judgments which comply with certain conditions the legal consequences described in our law by the term "debt." The action brought in a common law jurisdiction is for the purpose of enforcing or vindicating that common law debt, not the foreign judgment. The latter is merely one of a set of operative facts which according to the principles of the common law result in a debt. Similarly, where a common law court permits an action of debt to be brought upon a chancery decree for the payment of money the common law court does not "enforce the chancery decree" in any way. It merely treats the latter as an operative fact which results in a common law debt, for the non-payment of which the common law court will give relief.

It is not within the purpose of the present note to discuss the considerations which should guide courts in settling specific problems within the field of the Conflict of Laws. It may, however, be noted in passing that courts in America have naturally done what they do in other branches of the law, *viz.*, examined the decisions of other common law jurisdictions. Indeed, they have gone farther, for it may be said that the civilized nations of the world have within the field of the Conflict of Laws attempted to do what all our state courts have been trying to do with cases which are to be settled by "the common law," *i. e.*, applied a hypothetical system of law which is supposed to be common to all nations; hence the confusing term "Private International Law." But here, as elsewhere, the fact cannot be blinked that from the point of view of law in the technical sense the law applied is "not a brooding omnipresence in the skies . . . it always is the law of some particular state [country]."[13]

W. W. C.

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[12] The Massachusetts law is of course a fact for the New York court; equally so is the "Massachusetts right."

[13] Mr. Justice Oliver Wendell Holmes, in *Southern Pacific Co. v. Jensen* (1917) 244 U. S. 205, 37 Sup. Ct. 524. The learned justice was speaking of the "common law." From the point of view of an English or American lawyer, the law governing cases falling within the domain of the Conflict of Laws is, so far as no statute regulates the matter, "common law" and nothing more.